No. 86-955

In The Supreme Court of the United States

October Term, 1986

STEAG HANDEL GmbH,

Petitioner,

v.

HAWLEY FUEL COALMART, INC., and HAWLEY FUEL COAL, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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61 pp

QUESTIONS PRESENTED

1. Where jurisdiction was founded solely upon diversity of citizenship of the parties, was it constitutionally permissible for the federal Court of Appeals to reject, as "unduly technical," a requirement of the New York Statute of Frauds concerning the sufficiency of a writing?

2. Was it error for the Court of Appeals, in violation of controlling precedent, to engage in fact-finding as to a point not reached by the District Court?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Steag Handel GmbH and the respondents Hawley Fuel Coalmart, Inc. and Hawley Fuel Coal, Inc. The same parties are before this Court.

The corporate parent of petitioner Steag Handel GmbH is Walsum Energie and Bergwerksgesellschaft, a West German corporation whose corporate parent is Steag AG, also a West German corporation. The major shareholder of Steag AG is Ruhrkohle AG. There are no subsidiaries or affiliates of Steag Handel GmbH.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner Steag Handel GmbH (hereinafter described as "Petitioner") respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on July 15, 1986.

OPINIONS BELOW

The Order of the Court of Appeals for the Second Circuit denying a timely petition for rehearing and suggestion for rehearing *in banc* is reprinted in the appendix hereto, p.1a, *infra.* The opinion of the Court of Appeals for the Second Circuit is reported at 796 F.2d 29, and is reprinted in the appendix hereto, p.3a, *infra.*

The opinion of the United States District Court for the Southern District of New York (Sprizzo, D.J.), is reported at 614 F.Supp. 361, and is reprinted in the appendix hereto, p.15a, *infra.*

JURISDICTION

The diversity jurisdiction of the District Court was invoked under 28 U.S.C. §1332(a)(2), the Respondents being Delaware corporations having a principal place of business in New York, and the Petitioner being a company organized and existing under the laws of the Federal Republic of Germany, with a principal place of business outside the United States. The action, which involved an alleged contract of guarantee, was tried before Judge Sprizzo and a jury in March, 1984. The jury returned a verdict for Respondents. On Petitioner's motion for judgment notwithstanding the verdict the District Court, by Opinion and Order dated July 25, 1985, set aside the verdict. Judgment was entered in favor of Petitioner on September 6, 1985.

On Respondents' appeal, the Second Circuit, on July 15, 1986, reversed the judgment of the District Court and ordered that judgment be entered on the verdict. A timely petition for rehearing and suggestion for rehearing *in banc* were denied on September 9, 1986, and a mandate to the District Court to enter judgment on the verdict was issued September 17, 1986. Judgment was entered in Respondents' favor on September 30, 1986.

The jurisdiction of this Court to review the order and opinion of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

N.Y. General Obligations Law §5-701(a)(2) (McKinney Supp. 1986):

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his

lawful agent, if such agreement, promise or undertaking . . . Is a special promise to answer for the debt, default or miscarriage of another person."

STATEMENT OF THE CASE

This case involves the application of the New York Statute of Frauds, as set forth in General Obligations Law §5-701(a)(2), to an alleged contract of guarantee, a "special promise to answer for the debt, default or miscarriage of another person."

Respondents Hawley Fuel Coalmart, Inc. and Hawley Fuel Coal, Inc. alleged in the District Court that Petitioner had guaranteed the debts owed to them by a third party, Alla Ohio Valley Coals, Inc. (hereinafter described as "Alla"),[1] for coal shipped and to be shipped by Respondents under open purchase orders.

Petitioner is a West German company which, *inter alia,* has traded coal, oil and minerals in the international market. From 1978 until November, 1981, Petitioner purchased coal from Alla. Alla, in turn, purchased coal from numerous suppliers, including Respondents.

Petitioner made payment by irrevocable, documentary letters of credit, which it opened in favor of Alla at a New York bank. By this arrangement, Petitioner was able to use the terms and conditions imposed on the face of a letter of credit as some assurance of the quality of the coal it purchased from Alla. Alla, in turn, transferred Petitioner's letters of credit to its own suppliers of coal, including Respondents. To obtain payment under a letter of

[1] Alla is also described in the documents relevant to this litigation as "Alla-Ohio" or "AOV."

credit as transferred, a supplier would have to meet the documentary conditions pertaining to time of delivery and cargo specifications.

By the summer and fall of 1981, Alla was experiencing severe financial difficulties. It had failed to make payments due to its various suppliers, including Respondents. In October, 1981, representatives of the parties met twice in New York. At trial, sharply divergent accounts of these meetings were offered. Respondents' allegation was that, upon their threat to stop further shipments of coal to Alla and to reclaim coal in transit, Petitioner unconditionally guaranteed payment of approximately $2.2 million owed by Alla. This sum, according to Respondents, covered coal already shipped and to be shipped under existing purchase orders. Subsequently, between October 15, 1981 and October 20, 1981, a series of writings passed between the parties.

On November 6, 1981, Alla filed for bankruptcy. On November 9, 1981, Respondents called upon Petitioner to fulfill its unconditional guarantee of payment.

At trial the District Court reserved to itself the right to determine whether the writings satisfied the New York Statute of Frauds. It submitted to the jury the question of whether an oral guarantee had been made.

The jury found that Petitioner had given an oral guarantee to Respondents "with respect to all coal delivered and to be delivered under open purchase orders between Alla and [Respondents]." The jury found damages of $1,481,249.34.

Petitioner's motion for judgment notwithstanding the verdict was premised on the ground that the purported memoranda of the guarantee, in the form of certain

telexes exchanged between the parties, did not satisfy New York's Statute of Frauds.

In granting Petitioner's motion for judgment notwithstanding the verdict, the District Court held that the telexes had failed to contain

> "the clear and unambiguous expression of an agreement to pay the debt of another, which the New York courts have required as a safeguard against oral testimony." 614 F.Supp. at 364, p. 20a, *infra.*

The Court found, rather, that the

> "documents signed and/or prepared by [Petitioner] manifest at best an agreement by [Petitioner] to set up new letters of credit." 614 F.Supp. at 365, p. 22a, *infra.*

The District Court noted that an agreement to set up even unconditional letters of credit was an agreement different from an unconditional contract of guarantee, which Respondents had consistently and specifically alleged in their pleadings, the Pre-Trial Order, and at trial:

> "An agreement to open new letters of credit, even unconditional letters of credit, is not the same as a contract of guarantee, even though the letters of credit, once established, permit plaintiff to receive payment without meeting any of the technical requirements normally set forth in conditional letters of credit. The terms, remedies and the conduct which would constitute a breach of such a contract are all markedly different from those with respect to a contract of guarantee." 614 F.Supp. at 366, p. 23a, *infra.*

Expressly citing the cases which embody the clearly articulated requirement of New York law that the writings relied upon must reflect the contract alleged and not a different contract in order to satisfy the Statute of Frauds, the District Court ruled that

"It follows that a memorandum reflecting an agreement to open unconditional letters of credit is not sufficient to support an alleged contract of guarantee. *See, e.g., Stone v. Metropolitan Life Insurance Co.*, 12 N.Y.2d 487, 491, 191 N.E.2d 287, 288, 240 N.Y.S.2d 754, 755 (1963) (per curiam); *Standard Oil, supra,* 260 N.Y. at 155, 183 N.E. at 279; *Poel, supra,* 216 N.Y. at 314, 310 N.E. at 620; *Dorman, supra,* 66 A.D.2d at 414, 413 N.Y.S.2d at 379; *Kobre, supra,* 54 A.D.2d at 626, 387 N.Y.S.2d at 619." 614 F.Supp. at 366, pp. 23a-24a, *infra.*

In reversing, the Court of Appeals concluded that four telexes[2]

". . . clearly demonstrated that [Petitioner] agreed to issue letters of credit in the nature of guarantees and that it breached that agreement." 796 F.2d at 34, p. 13a, *infra.*

The Court of Appeals, which had previously evinced hostility towards the New York State courts' reading of the New York Statute of Frauds, substituted for the meticulous Statute of Frauds analysis applied by the District Court the assertion that writings demonstrating an agreement to issue letters of credit "in the nature of guarantees" would be sufficient to satisfy the Statute. Despite the New York State precedent identified and followed by the District Court, see 614 F.Supp. at 366, pp. 23a-24a, *infra*, which precisely requires written evidence of the contract alleged and not some other contract, the Court of Appeals concluded that

"While the complaint alleged a written guarantee of payment, it would be unduly technical to make the pleading outcome-determinative." 796 F.2d at 34, p. 13a, *infra.*

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[2]These documents were introduced into evidence as Exhibits Q-1, U-1, 11 and V. They are reproduced at pages 29a-39a, *infra.*

Moreover, the Court of Appeals reversed the District Court only after it made a finding of fact on a point never reached by the District Court, to wit: that the letters of credit which Petitioner agreed to issue were to be unconditional. The Court of Appeals stated:

> ". . . the jury verdict in plaintiffs' favor was overturned *because the court determined that plaintiffs had offered written evidence sufficient to support an agreement to open unconditional letters of credit,* but insufficient writings to support the alleged contract of guarantee." 796 F.2d at 34 (emphasis added), p. 12a, *infra*.

The District Court had made no finding as to whether the documents before it evidenced an agreement by Petitioner to set up unconditional (non-documentary) as opposed to conditional (documentary) letters of credit, which theretofore had been Petitioner's customary practice. The District Court had simply stated that even if the new letters of credit were unconditional it would make no difference:

> "Plaintiff's argument that defendant has admitted the agreement alleged rests largely upon the contention that [Petitioner] agreed to open unconditional letters of credit, which plaintiff claims amounted to an unequivocal guarantee of Alla's indebtedness to plaintiff. In this regard, plaintiff relies, *inter alia*, on the testimony of Dr. Thomas Mulert. *Even assuming* that Dr. Mulert's testimony can be construed to state that [Petitioner] opened up unconditional letters of credit, *which is not clearly the case, see, e.g.,* Trial Transcript ("Tr.") at 395-97, 468-80, it is nonetheless insufficient to support the alleged oral guarantee." 614 F.Supp. at 365-366, p. 23a, *infra* (emphasis added).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS REFUSED TO ACCEPT AND APPLY NEW YORK LAW AS TO THE STATUTE OF FRAUDS

Jurisdiction in this action was predicated solely on diversity of citizenship. Both the District Court and the Court of Appeals, therefore, were required to apply the New York Statute of Frauds and interpret that law as would a court of the State of New York. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); see also *Walker v. Armco Steel Corp.,* 446 U.S. 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980).

The principle that a federal court sitting in a diversity case must apply state law is of constitutional dimension. At the Virginia Convention called to ratify the Constitution, John Marshall, in response to a question as to what law would apply in the federal courts in diversity cases, expounded:

> "By the laws of which state will it be determined? said he. By the laws of the state where the contract was made. According to those laws, and those only, can it be decided. . . ." 3 Elliott's Debates, 556; see *Guaranty Trust Co. v. York, infra,* n. 2.

Confirming this principle, this Court has stated that the policy underlying the *Erie* decision as regards substantive state law

> "[i]n essence . . . was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the

> diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079, 2086 (1945).

Under the *Erie* doctrine, a federal court in a diversity case may not refuse to follow state precedent even if it perceives it to be unwise or outmoded, but must apply that precedent as enunciated by the courts of the state.

Here the Court of Appeals failed to apply controlling New York law and reached a result that is directly contrary to the pronouncements of the highest court of New York regarding the sufficiency of a memorandum for purposes of the Statute of Frauds. Significantly, the result herein is not an isolated instance of a federal court's failure to follow controlling state law in a diversity case, but rather is part of a trend. The Second Circuit has evinced a continuing unwillingness to apply the New York Statute of Frauds as would a court of the State of New York.

In *Ohanian v. Avis Rent-A-Car System, Inc.*, 779 F.2d 101 (2d Cir. 1985), which was decided just two months before the argument in the instant case, the Second Circuit denounced New York's Statute of Frauds as an "anachronism" and declared that "[t]he reasons that prompted its passage no longer exist." 779 F.2d at 106.[3]

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[3]For recent criticism of *Ohanian*, see *Skye King Corp. v. Fisher Camuto Corp.*, __ N.Y.S.2d __, N.Y.L.J. 7/10/86, p. 6, col. 4 (Sup. Ct., N.Y. County) (not officially reported).

The Court of Appeals' refusal to apply the New York Statute of Frauds and relevant case law herein, together with its statements in *Ohanian,* are inimical to the principle, recognized by this court in *Erie* and reaffirmed in subsequent cases, that where jurisdiction is premised solely on diversity of citizenship, federal courts must apply the law as enunciated by the highest State court. This the Court of Appeals declined to do. Its rejection of controlling State law reduces the concept of federalism—a concept of constitutional import—to a mere historical shibboleth.

The Court of Appeals' express rejection of New York law is evidenced by the statement that in determining the sufficiency of a writing for purposes of the Statute of Frauds, it would be "unduly technical to make the pleading outcome-determinative." 796 F.2d at 34, p. 13a, *infra*. This holding is contrary to rulings of the New York Court of Appeals, specifically identified by the District Court, which unequivocally hold that the writings relied upon must evidence the precise contract alleged and not some other agreement. In the seminal case of *Poel v. Brunswick-Balke-Collender Co.,* 216 N.Y. 310, 110 N.E. 619 (1915), the New York State Court of Appeals expounded the principle that a party

> ". . . cannot prevail upon the theory that the writings express a contract, different in its terms and conditions from the contract which the parties entered into. In order to satisfy the requirements of the Statute of Frauds the written note or memorandum must include all the terms of the completed contract which the parties made. It is not sufficient that the note or memorandum may express the terms of *a* contract. It is essential that it shall completely evidence *the* contract which the parties made. *If instead of proving the existence of that contract, it establishes that there was in fact no contract or evidenced a contract in terms and conditions different from that which the parties entered into, it fails to comply with the statute."* 216 N.Y. at 314 (citations omitted) (emphasis added).

Poel remains the definitive pronouncement of the New York Court of Appeals as to the sufficiency of a memorandum for purposes of the Statute of Frauds. See, e.g., *Kobre v. Instrument Systems Corp.*, 54 A.D.2d 625, 626, 387 N.Y.S.2d 617, 619 (1st Dept. 1976), affd. 43 N.Y.2d 862, 374 N.E.2d 131, 403 N.Y.S.2d 220 (1978); *Intercontinental Planning, Ltd. v. Daystrom,* 24 N.Y.2d 372, 378-79, 248 N.E.2d 576, 579-80, 300 N.Y.S.2d 817, 822 (1969); *Stone v. Metropolitan Life Ins. Co.,* 12 N.Y.2d 487, 491, 191 N.E.2d 287, 288, 240 N.Y.S.2d 754, 755 (1963); *Dorman v. Cohen,* 66 A.D.2d 411, 414, 413 N.Y.S.2d 377, 379 (1st Dept. 1979).[4]

The approach taken by the Second Circuit here, following closely on *Ohanian,* is likely to have an impact far beyond the instant litigation. Given the stature of New York City as an international center of finance and commerce, the virtual overruling of *Poel* and the apparent intent of the Second Circuit to avoid application of the Statute of Frauds may result in a disproportionate increase of commercial litigation in the federal courts, where a favorable result may be obtained despite the absence of a writing. This, in turn, could lead to inconsistent results between the state and federal courts. Lest the approach taken by the Court of Appeals evolve into piecemeal "legislation" by federal courts sitting in diversity cases, this Court should grant the instant petition for a writ of certiorari and review the actions of the Court of Appeals.

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[4]Curiously, a different panel in the Second Circuit had specifically acknowledged *Poel* as controlling precedent in a case decided in 1984. See *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77-78 (2d Cir. 1984). By its decision herein, the Second Circuit implicitly has rejected that precedent.

II.

THE COURT OF APPEALS ENGAGED IN IMPERMISSIBLE FACT-FINDING

Review of the actions of the Court of Appeals is warranted for the further reason that the Court of Appeals failed to follow a controlling decision of this Court which prohibits it from making a finding of fact.

In *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. __, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986), this Court vacated a determination of the Ninth Circuit Court of Appeals on the ground that a Court of Appeals cannot engage in fact finding. Respondents therein, who were employed by the petitioner on board a barge that processed fish, sought to recover overtime benefits under the Fair Labor Standards Act ("FLSA"). The District Court found that respondents were "seamen" because they performed work of a maritime character on navigable waters, and were therefore excluded from such benefits under a provision of the FLSA which excluded seamen. The Ninth Circuit reversed and, using a *de novo* standard of review, determined that respondents were not "seamen" because their "dominant employment" was "industrial maintenance." In vacating that determination, this Court held that

> "[i]f the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings . . . it should not simply have made factual findings on its own." 89 L.Ed.2d at 744-745.

That, however, is precisely what the Court of Appeals did in the instant case. Judge Sprizzo, in granting Petitioner's motion for judgment notwithstanding the verdict,

made no finding that the letters of credit to which the telexes referred were to be unconditional letters of credit. The decision of the Court of Appeals, however, is necessarily premised on that assumption. Without a perceptible basis in the telexes cited, the Court of Appeals found as a fact that the relevant letters of credit were to be "stand-by" or guarantee letters of credit, which "were not conditional on future performance by [Respondents]," 796 F.2d at 34, p. 12a, *infra,* and which were not "a limitation or condition on the agreement." 796 F.2d at 34, p. 13a, *infra.*

This constituted impermissible fact-finding which is analytically indistinguishable from the fact-finding of the Ninth Circuit condemned in *Icicle Seafoods.* Indeed, the reasoning of this Court in *Icicle Seafoods* applies here *a fortiori,* since there is some indication (see dissenting opinion of Justice Stevens), that the facts found by the Ninth Circuit in *Icicle Seafoods* were uncontested. Here, by contrast, the proposition that the letters of credit to be opened by Petitioner would be unconditional letters of credit, which was the key to the Second Circuit's determination, was vigorously contested.[5]

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[5]An additional evil inherent in fact-finding on the part of a Court of Appeals is the absence of the restraint imposed by the review process. This evil is vividly exemplified where, as here, the finding of the Court of Appeals is clearly erroneous. The Second Circuit reasoned that

> "The letters of credit here referred to were not conditional on future performance by [Respondents]. [Petitioner's] October 19 inter-office telex [Exhibit 11] evidences the absence of such conditions when, with regard to the letters of credit, it simply states that 'the money has been or will be collected by [Petitioner].' *In other words,* the letters of credit were what Professor Hawkland calls a standby or guaranty letter of credit, as distinguished from

[Footnote continued on following page]

By reason of the errors of law and the clearly erroneous findings of fact, made in violation of this Court's holding in *Icicle Seafoods, supra,* which permeate the decision of the Court of Appeals, the instant Petition should be granted. Review of the actions of the Court of Appeals is urged in order that Petitioner may be afforded due process of law.

[Footnote continued from preceding page]

the conditional letter of credit on which the beneficiary can recover only by delivering a document of title to the issuer." 796 F.2d at 34 (emphasis added), p. 12a, *infra*.

The cited support for the conclusion that the letters of credit were not to bear conditions related to Respondent's future performance is the second sentence, which concludes that the letters of credit would be unconditional because of Petitioner's words, in another writing, that "the money has been or will be *collected by [Petitioner]*" (emphasis added). These words, "the money has been or will be collected by [Petitioner]," are found to mean that Petitioner's letters of credit through which Respondents might seek to collect money were guarantee letters of credit. This is made clear from the third sentence, which takes Petitioner's words and "In other words" transmutes them into the statement that the letters of credit were to be guarantee letters of credit.

The inferential leap thus made is unsupportable under New York law and is without basis in fact or logic. It simply does not follow from a statement that "the money has been or will be collected by [Petitioner]" that letters of credit described in different writings were to be unconditional.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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December 5, 1986

APPENDIX A—ORDER OF COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING A TIMELY PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Ninth day of September one thousand nine hundred and eighty-six.

HAWLEY FUEL COALMART, INC., and HAWLEY FUEL COAL, INC.,

Plaintiffs-Appellants,

v.

STEAG HANDEL GMBH,

Defendant-Appellee.

No. 85-7787

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, Steag Handel GMBH,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the

appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

APPENDIX B—OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

HAWLEY FUEL COALMART, INC.,
and Hawley Fuel Coal, Inc.,
Plaintiffs-Appellants,

v.

STEAG HANDEL GMBH,
Defendant-Appellee.

No. 689, Docket 85-7787.

United States Court of Appeals,
Second Circuit.

Argued Jan. 27, 1986.
Decided July 15, 1986.

Seller brought action against buyer's financer to recover for breach of contract of guarantee. The United States District Court for the Southern District of New York, John E. Sprizzo, J., 614 F.Supp. 361, entered judgment in favor of financer, and seller appealed. The Court of Appeals, Oakes, Circuit Judge, held that telex messages satisfied requirements of statute of frauds.

Reversed.

1. Frauds, Statute of §131(1)

Financer's agreement to make a $500,000 cash payment against monies owed on stymied letters of credit and against new letters of credit to be issued covering the balance owed and to be owed for future sales was not a mere modification of financer's prior agreement to ensure payment of buyers' purchases from seller and thus was not outside statute of frauds. N.Y.McKinney's General Obligations Law, §5-701, subd. a, par. 2.

2. Frauds, Statute of §118(4)

Telex in which financer confirmed that it would pay seller a down payment for coal previously shipped to buyer and that the balance owed would be paid under letters of credit to be opened at a particular bank, and telex reassuring seller that it was financer's intention to guarantee full payment of the indebtedness owed to it were adequate to satisfy statute of frauds requirement for a special promise to answer for the debt of another, despite contention that the seller was seeking to recover on an oral guarantee of contract whereas the documents showed only the existence of letters of credit. N.Y.McKinney's General Obligations Law, § 5-701, subd. a, par. 2.

George Berger, New York City, (Debra A. Roth, Phillips, Nizer, Benjamin, Krim & Ballon, New York City, of counsel), for plaintiffs-appellants.

Herbert Rubin, New York City (Edward L. Birnbaum, Terry Myers, Barbara D. Goldberg, Herzfeld & Rubin, P.C., New York City, of counsel), for defendant-appellee.

Before FRIENDLY*, OAKES, and WINTER, Circuit Judges.

OAKES, Circuit Judge:

This diversity case involves the question whether a combination of writings satisfied the New York statute of frauds. The United States District Court for the Southern District of New York, John E. Sprizzo, Judge, held that it did not and therefore set aside a jury verdict of $1,481,249.34 plus interest in favor of appellants Hawley Fuel Coalmart, Inc., and Hawley Fuel Coal, Inc. (jointly "Hawley"), in their suit against appellee, Steag Handel GmbH ("Steag"), for breach of a contract of guarantee. 614 F.Supp. 361 (S.D.N.Y.1985). We reverse and direct

entry of judgment on the verdict.

Hawley, a supplier of coal to Alla-Ohio Valley Coals, Inc. ("Alla"), had terminated that relationship because of Alla's late payments. Subsequently, Steag and Alla entered into agreements under which Steag undertook to finance coal purchases by Alla through the medium of documentary letters of credit drawn on Steag's New York City bank, Commerzbank. The letters of credit were to be drawn in Alla's favor and Alla was then to transfer the letters to coal suppliers. After Steag and Alla established this relationship, an arrangement was worked out in June, 1981, under which Hawley would again sell coal to Alla. Steag was to advise Alla of its requirements, Alla in turn would issue a purchase order to Hawley to meet them, Steag would approve the order and direct Commerzbank to issue a documentary letter of credit, which Alla would then transfer to Hawley. Hawley would subsequently deliver coal in accordance with the purchase orders and present its delivery documents to Commerzbank for payment. Commerzbank would pay Hawley and charge Steag's letter of credit account. This arrangement apparently functioned only until August of 1981 when Hawley began to build up an accounts receivable backlog because of delays in obtaining letters of credit and amendments to those letters. By early October, 1981, Hawley was owed approximately $2.2 million for coal delivered to Alla under the agreement.

In mid-October of 1981 the parties met at the Carlyle Hotel in New York City at Hawley's request. Hawley was represented by its president, Jean-Paul Ruff, and vice president/treasurer, Martin Farber. Steag was represented by Thomas Mulert and Jens Klien, two of its managing directors. The accounts presented at trial varied as to what happened at that meeting. The jury, however, apparently credited Hawley's version, as follows. Hawley indicated that, unless it received immediate payment of the $2.2

million owed either for coal that had been shipped or that was in the process of being shipped under open purchase orders, it would stop all further shipments and direct counsel to attempt to reclaim coal in transit or at the ports awaiting loading. Mulert in response said that he was going to Washington on October 15 and asked that a breakdown of the $2.2 million be sent to Max Bonner, who was scheduled to become Alla's president, in Washington; Hawley agreed to send this information. Mulert then stated that Steag would make a $500,000 cash down payment to Hawley on the amounts due and owing under the letters of credit and that Steag would guarantee payment of the balance of the coal shipped or to be shipped under existing purchase orders by means of a new letter of credit. Ruff and Farber agreed that Hawley would take no further steps to reclaim the coal and asked that Steag's agreement be confirmed in writing. Mulert agreed to provide this confirmation when he reached Washington.

On October 15, 1981, Farber telexed Bonner the requested breakdown. The telex listed invoices submitted to Commerzbank that had not been paid because promised letters of credit had not been issued, outstanding invoices sent directly to Alla, and invoices that were to be submitted to Commerzbank after letters of credit had been issued. That same day Mulert, on behalf of Steag, telexed Hawley, attention Mr. Ruff, as follows:

> URGENT URGENT URGENT
> THIS IS TO CONFIRM ON BEHALF OF STEAG HANDLE GMBH, THAT WE SHALL PAY TO YOU OUT OF OUR BANK ACCOUNT AT COMMERZBANK IN NEW YORK A DOWNPAYMENT FOR COAL SHIPPED BY YOU TO ALLA-OHIO IN THE AMOUNT OF US DOLLARS, 500,000. THE PAYMENT SHALL BE EFFECTED BY TELEGRAPHIC TRANSFER ON OCTOBER 16, 1981.
> THE BALANCE OF THE AMOUNTS OWED TO YOU

BY AOV SHALL BE PAID UNDER LETTERS OF CREDIT OPENED AT COMMERZBANK NEW YORK. STEAG WILL OPEN THESE LETTERS OF CREDIT IN THE COURSE OF THE NEXT WEEK.

Mulert testified at trial that he thought the agreement reached at the Carlyle Hotel covered only coal already delivered. He maintained that a total of about $584,000 was owed for this coal and that the balance referred to in the third paragraph of his telex was thus approximately $84,000. The jury, answering a special interrogatory, found that this was not Steag's agreement at all. In rejecting Mulert's testimony, the jury found specifically that Steag agreed to guarantee the payment of all sums owed by Alla to Hawley with respect to all coal delivered and to be delivered under open purchase orders between Alla and Hawley, namely, the $2.2 million referred to in the Hawley telex of October 15.

The Steag telex of October 15 secured its desired end. Upon receipt of that telex, Hawley instructed counsel to cease all efforts to reclaim coal and resumed its deliveries, shipping another $168,000 worth of coal to Alla thereafter.

On October 16, Hawley received a telex sent by Steag and its new business associate, H.C. Sleigh Limited ("Sleigh"), which reads as follows:

WE HAVE BEEN ADVISED BY AOV INDUSTRIES, INC. THAT YOU ARE OWED MONEYS FOR COAL SUPPLIED TO AOV.
THIS IS TO CONFIRM TO YOU THAT H.C. SLEIGH LIMITED HAS ACQUIRED A 50% SHARE IN AOV'S STOCK. IN THIS CAPACITY SLEIGH IS IN THE MIDST OF STRENGTHENING AOV'S FINANCIAL CAPACITY WITH THE HELP OF STEAG HANDEL GMBH OF GERMANY, AOV'S PRINCIPAL DISTRIBUTOR.
THIS STRENGTHENING IS EXPECTED TO RESULT

IN A TRANSFER OF FUNDS TO YOUR ACCOUNT IN FULL PAYMENT OF THE INDEBTEDNESS PRESENTLY OWED TO YOU. H.C. SLEIGH AND STEAG LOOK FORWARD TO REESTABLISHING A SOUND AND MUTUALLY SATISFYING BUSINESS RELATIONSHIP WITH YOU IN THE IMMEDIATE FUTURE.

This telex was sent to all of Alla's creditors. The first sentence of the third paragraph seemed to Hawley officials to send signals in conflict with the telex of October 15, which stated that Hawley "shall" be paid for amounts owed by Alla. They called Bonner for clarification and later received in response a telex from him:

FURTHER TO OUR TELEPHONE CONVERSATION AND TO CLARIFY OUR GENERAL MASS DISTRIBUTION TELEX SENT 15 OCTOBER TO ALL CREDITORS OVER THE JOINT SIGNATURES OF SLEIGH AND STEAG,

PLEASE BE REASSURED THAT IT WAS AND IS THE INTENTION OF SLEIGH AND STEAG TO GUARANTEE FULL PAYMENT OF THE INDEBTEDNESS TO YOU OF MONEYS OWED BY AOV.

PLEASE ALSO REFER TO STEAG'S OTHER TELEX OF 15 OCTOBER ADVISING THAT A DOWN PAYMENT OF USD 500,000 WOULD BE MADE AND THAT, I QUOTE

"THE BALANCE OF THE AMOUNTS OWED TO YOU BY AOV SHALL BE PAID."

Hawley responded as follows:

WE APPRECIATE THE RECEIPT OF YOUR TELEX 0892413 CLARIFYING THE INTENTION OF SLEIGH AND STEAG TO GUARANTEE FULL PAYMENT OF INDEBTEDNESS OWED US BY AOV.

On October 16 Mulert telexed Commerzbank directing the payment of $500,000 to Hawley. Significantly, under the heading "DETAILS OF PAYMENT", he stated that this money was a "DOWNPAYMENT FOR OUTSTANDING INVOICES OF AOV". Hawley received the $500,000 on October 19 and credited it against the amount outstanding and due from Alla. On that same day a Steag employee in Washington telexed Steag's home office advising of the

> US DOLLARS 500,000.00. . . .DOWN PAYMENT FOR DELIVERIES OF THE JOINT BUSINESS (MAINLY CORAL). COMMERZBANK NEW YORK IS IN THE POSSESSION OF DOCUMENTS FOR MORE THAN US DOLLARS 500,000.00 WE AGREED WITH COMMERZBANK. . . .THAT THIS DOWN PAYMENT WILL BE TAKEN INTO ACCOUNT WHEN MAKING THE PAYMENTS FOR THE ALREADY OPENED L/C'S.
> HAWLEY HAD STOPPED FURTHER DELIVERIES BECAUSE THERE WERE 52 OPEN INVOICES WITH AN AMOUNT OF 1.6 MIO [*sic,* MIL] US DOLLARS.

Steag then telexed Hawley on October 20:

> TO HAWLEY FUEL
> RE: DELIVERY TO ALLA OHIO
> WE HEREWITH WANT TO INFORM YOU THAT WE HAVE OPENED LETTER OF CREDITS [*sic]* IN YOUR FAVOR IN THE AMOUNT OF USD 633,000.00 PROBABLY TOMORROW THE RELEASE WILL BE GIVEN TO THE BANK FOR EDITIONAL [*sic]* USD 1,385,000.00.

Hawley did not receive the $633,000 letter of credit referred to in the October 20 telex. While Steag later opened three letters of credit in the promised amount of $1,385,000, these were not designated for the balance due

on open purchase orders. They were earmarked instead for specific purchase orders under which coal had never been shipped; thus Hawley could not collect under these letters of credit for coal already shipped pursuant to different purchase orders. Except for a partial payment under the third letter of credit and two further payments a gainst old letters of credit, Hawley received no further payments under the agreement in suit.

On November 6, 1981, Alla filed a petition for reorganization in the United States Bankruptcy Court in the District of Comumbia. Hawley in turn filed a claim in that proceeding for sums due.

DISCUSSION

[1] Hawley takes the position that the agreement at issue was not "technically" a guarantee of Alla's debt, but simply a modification of the payment terms of Steag's original undertaking; Hawley maintains that, as a modification of an original undertaking, the agreement was not within the statute of frauds. Under this theory, Steag's obligation to Hawley dated from June, 1981, when Steag agreed to pay Hawley for purchase orders by Alla through the issuance of documentary letters of credit. This agreement was revised when the letter of credit mechanism broke down. The modified agreement required Steag to make a $500,000 cash payment against moneys owed on stymied letters of credit and new letters of credit to issue covering the balance owed and to be owed for future coal deliveries under existing purchase orders. Hawley maintains that this was not a "special promise to answer for the debt. . . .of another person" within section 5-701(a)(2) of the New York General Obligations Law (McKinney Supp.1986), since it was an original promise serving a personal interest of Steag, and paying the debt of Alla was only an incidental effect. But as the New York Court of

Appeals has held, "[P]resumptively the new promise [by the third party] is unenforceable [under the statute of frauds] unless the corporation was discharged from its underlying obligation." *Martin Roofing, Inc. v. Goldstein,* 60 N.Y.2d 262, 267, 457 N.E.2d 700, 703, 469 N.Y.S.2d 595, 598 (1983), *cert. denied,* 466 U.S. 905, 104 S.Ct. 1681, 80 L.Ed.2d 156 (1984). There is nothing to suggest such a discharge of Alla. To the contrary, Hawley's filing of a claim in Alla's bankruptcy proceedings indicates that Alla was not discharged. In the absence of any evidence of discharge, Hawley's contract modification argument must fail.

Hawley argues in the alternative that even if the writings represent a promise of guarantee, and thus are covered by the statute of frauds, they are nonetheless sufficient to satisfy the statute's requirements. We find this contention convincing. Under New York law the writing necessary to satisfy the statute of frauds may be embodied in several documents, only one of which need be signed by the party to be charged. *See, e.g., Crabtree v. Elizabeth Arden Sales Corp.,* 305 N.Y. 48, 55-56, 110 N.E.2d 551, 554 (1953). In addition, the statute also requires that "all the material terms of the agreement" be contained either "expressly or by reasonable implication" in the writing. *Morris Cohon & Co. v. Russell,* 23 N.Y.2d 569, 575, 245 N.E.2d 712, 715, 297 N.Y.S.2d 947, 953 (1969).

[2] In concluding that the writings were insufficient to satisfy the statute, the district court focused on the October 16 joint telex from Steag and Sleigh. Rather, it should have looked to the "URGENT URGENT URGENT" telex from Steag to Hawley on October 15, in combination with the October 19 Steag telex from Washington to its home office and the Steag telex of October 20 informing Hawley that letters of credit worth $633,000 had been opened in its favor and that "probably tomorrow" the release would be given to the bank for an

additional $1,385,000. When considered with the October 15 telex of Hawley to Bonner setting forth the balances due, the writings satisfy the statute.

The district court distinguished *Crabtree* on the basis that the court in this case could not ascertain essential terms and conditions of the contract sued upon without taking oral testimony. 614 F.Supp. at 364-65. The court below found that, while plaintiff established at trial the existence of an oral contract of guarantee, "the documents signed and/or prepared by the defendant manifest at best an agreement by the defendant to set up new letters of credit." *Id* at 365. Judge Sprizzo noted:

> An agreement to open new letters of credit, even unconditional letters of credit, is not the same as a contract of guarantee, even though the letters of credit, once established, permit plaintiff to secure payment without meeting any of the technical requirements normally set forth in conditional letters of credit.

Id. at 366. Thus, the jury verdict in plaintiffs' favor was overturned because the court determined that plaintiffs had offered written evidence sufficient to support an agreement to open unconditional letters of credit, but insufficient writings to support the alleged contract of guarantee.

We disagree. The letters of credit here referred to were not conditional on future performance by Hawley. Steag's October 19 inter-office telex evidences the absence of such conditions when, with regard to the letters of credit, it simply states that "the money has been or will be collected by Steag." In other words, the letters of credit were what Professor Hawkland calls a standby or guaranty letter of credit, as distinguished from the conditional letter of credit on which the beneficiary can recover only by delivering a document of title to the issuer. *See* 6 W. Hawkland & T. Holland, *Uniform Commercial Code Series* §5-102:06 (1984); *see also* Dolan, *Standby Letters of Credit and Fraud (Is the Standby Only Another*

Invention of the Goldsmiths in Lombard Street?), 7 Cardozo L.Rev. 1, 2-5(1985). Since, as Professor Hawkland says, "the practical purpose of a standby letter of credit is to guarantee the obligation of the issuer's customer," 6 W. Hawkland & T. Holland, *supra,* §5-102:06 at 19, the reference in the October 15 Steag telex to Hawley to letters of credit simply concerned the form in which part of the payment would be made.

The record provides ample additional documentary evidence demonstrating that the letters of credit were simply a form of payment. Steag's own telex of October 16 to Commerzbank refers to "outstanding" invoices of Alla and its telex of October 19 refers to "52 open invoices with an amount of 1,6 Mio [*sic*] US Dollars." Steag's confirmatory telex to Hawley referring to the opening of letters of credit worth $633,000 and an additional release "probably tomorrow" of $1,385,000 certainly speaks toward past amounts due. Thus, Steag had agreed to pay Hawley and the letters of credit were to be the form of payment, not a limitation or condition on the agreement. To the extent that it could be argued that these letters embodied conditions on the quality of the coal shipped, these conditions could only have gone to the amount, not the necessity of payment. In any event, Steag does not claim any offset for deficient quality nor did it reject any coal on that basis, and any argument concerning unsatisfied conditions is therefore clearly unavailing.

In short, the documentary evidence here clearly demonstrated that Steag agreed to issue letters of credit in the nature of guarantees and that it breached that agreement. While the complaint alleged a written guarantee of payment, it would be unduly technical to make the pleading outcome-determinative. The important fact is that the jury found that Steag made a guarantee and that there was clearly sufficient written evidence for that finding.

Judgment reversed.

FOOTNOTE

*Judge Friendly's death occurred after argument but before this opinion was written; he voted in favor of the disposition made herein.

APPENDIX C—OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (SPRIZZO, D.J.)

HAWLEY FUEL COALMART, INC.
and Hawley Fuel Coal, Inc.,
Plaintiffs,

v.

STEAG HANDEL, GmbH., Defendant.
No. 82 Civ. 3686 (JES).
United States District Court,
S.D. New York.
July 25, 1985.

Creditors brought action seeking to enforce alleged contract of guarantee against purported guarantor. Guarantor moved for judgment notwithstanding the verdict. The District Court, Sprizzo, J., held that: (1) documents signed and/or prepared by purported guarantor, which manifested at best an agreement by guarantor to set up new letters of credit for debtor, would not permit district court to ascertain all of essential terms and conditions of oral contract of guarantee, without recourse to oral testimony, and thus, documents were insufficient to satisfy New York statute of frauds; (2) creditors actions in continuing to ship coal to debtor and in not seeking to recover coal already shipped were not part performance sufficient to take alleged oral guarantee outside of statute of frauds; and (3) injury allegedly resulting to creditors was not an unconscionable injury so as to estop purported guarantor from asserting statute of frauds.

Motion granted.

1. Frauds, Statute of §106(1)

Writing which indicated a future intention to guarantee was not sufficient to support alleged existing oral guarantee under New York statute of frauds. N.Y. McKinney's General Obligations Law §5-701, subd. a, par.2.

2. Frauds, Statute of §106(1)

Telex sent jointly by purported guarantor and 50% owner of debtor to creditors which stated that they were working to strengthen debtor's financial capacity and that strengthening was expected to result in transfer of funds to creditors was not sufficient to satisfy requirements of New York statute of frauds [N.Y.McKinney's General Obligations Law §5-701, subd. a, par.2], where telex did not state that payment would be made by purported guarantor and did not mention guarantee, and where telex was sent to all creditors rather than creditors whose debts were purportedly guaranteed.

3. Frauds, Statute of §115(3)

Documents arguably supporting alleged oral guarantee, which were prepared by and signed only by creditors, were not sufficient to satisfy requirements of New York statute of frauds [N.Y.McKinney's General Obligations Law §5-701, subd. a, par.2].

4. Frauds, Statute of §118(2)

Under New York law, where entire contract is contained in separate documents which all clearly refer to same subject or transaction, and where court can ascertain essential terms of agreement by considering all of various memoranda together and without recourse to oral testimony, requirements of statute of frauds can be satisfied.

5. Frauds, Statute of §119(1)

Purpose of statute of frauds in New York is to protect a defendant against having a contract established by oral testimony.

6. Frauds, Statute of §113(2)

Under New York law, memoranda relied upon to satisfy statute of frauds must be such that from an examination of documents themselves all of the essential terms and conditions of oral contract may be obtained.

7. Frauds, Statute of §113(3)

Documents signed and/or prepared by purported guarantor, which manifested at best an agreement by guarantor to set up new letters of credit for debtor, would not permit district court to ascertain all of essential terms and conditions of oral contract of guarantee, without recourse to oral testimony, and thus, documents were insufficient to satisfy New York statute of frauds [N.Y.McKinney's General Obligations Law §5-701, subd. a, par. 2].

8. Frauds, Statute of §144

Even if New York law allows oral testimony to resolve disputes between parties as to terms of alleged oral contract where defendant has admitted existence of oral contract, purported guarantor's alleged agreement to open new letters of credit which would permit creditors to secure payment without meeting any of technical requirements normally set forth in conditional letters of credit did not amount to an admission of guarantee, since terms, remedies, and conduct which would constitute breach of agreement to open new letters of credit would be markedly different from those with respect to contract of guarantee, and thus, alleged agreement to open new letters of credit was not sufficient to support oral contract of guarantee. N.Y.McKinney's General Obligations Law §5-701, subd. a, par. 2.

9. Frauds, Statute of §129(12)

For partial performance to be sufficient to take otherwise unenforceable oral contract outside of New York statute of frauds, performance must be unequivocably referable to alleged oral contract.

10. Frauds, Statute of §129(12)

Creditor's actions in continuing to ship coal to debtor and in not seeking to recover coal already shipped was not part performance sufficient to take otherwise unenforceable oral contract of guarantee outside of New York statute of frauds [N.Y.McKinney's General Obligations Law §5-701, subd. a, par. 2], where creditors already had contractual obligation to deliver coal to debtor.

11. Frauds, Statute of §144

Under New York law, concepts of estoppel may require enforcement of oral promise otherwise unenforceable under statute of frauds only where plaintiff has suffered an unconscionable injury.

12. Frauds, Statute of §144

Injury resulting to creditors from performance of contract requiring creditors to deliver coal to debtor was not an unconscionable injury so as to estop purported guarantor from asserting New York statute of frauds [N.Y.McKinney's General Obligations Law §5-701, subd. a, par. 2] as defense to alleged oral contract of guarantee.

Phillips, Nizer, Benjamin, Krim & Ballon, New York City, for plaintiffs; George Berger, Martha R. Overall, Debra A. Roth, New York City, of counsel.

Herzfeld & Rubin, P.C., New York City, for defendant; Herbert Rubin, Edward L. Birnbaum, Terry Myers, Barbara D. Goldberg, New York City, of counsel.

SPRIZZO, District Judge:

Plaintiffs Hawley Fuel Coalmart, Inc. and Hawley Fuel Coal, Inc. (collectively referred to as "plaintiff" or "Hawley") seek to enforce an alleged contract of guarantee against defendant Steag Handel, GmbH ("Steag"). Hawley, a supplier of coal to Alla Ohio Valley Coals, Inc. ("Alla"), alleged at trial that defendant Steag

agreed to guarantee the debts of Alla to plaintiff in exchange for plaintiff's agreement to continue to deliver coal to Alla, which was a supplier of coal to Steag. Plaintiff contended at trial that it would have ceased shipment of coal to Alla and would have sought to recover coal already shipped had not defendant guaranteed payment of Alla's debts to plaintiff.

The jury found that Steag had orally guaranteed Alla's debts. The only issue raised by defendant's motion for judgment notwithstanding the verdict is whether the alleged oral contract of guarantee is enforceable pursuant to the New York statute of frauds. N.Y.Gen.Oblig.Law § 5-701(a)(2) (McKinney Supp.1984-85).[1]

Plaintiff contends that the oral contract of guarantee is enforceable because it is evidenced by writings sufficient to satisfy the statute of frauds, *i.e.* that there are writings signed by and/or prepared by the defendant which set forth all of the essential terms of the oral contract alleged. *See, e.g., Scheck v. Francis,* 26 N.Y.2d 466, 470-71, 260 N.E.2d 493, 495, 311 N.Y.S.2d 841, 843-44 (1970); *Intercontinental Planning, Ltd. v. Daystrom, Inc.,* 24 N.Y.2d 372, 379, 248 N.E.2d 576, 579-80, 300 N.Y.S.2d 817, 822 (1969); *Crabtree v. Elizabeth Arden Sales Corp.,* 305 N.Y.48, 55-56, 110 N.E.2d 551, 554 (1953); *Standard Oil Co. v. Koch,* 260 N.Y. 150, 155, 183 N.E. 278, 279 (1932); *Dorman v. Cohen,* 66 A.D.2d 411, 418, 413 N.Y.S.2d 377, 382 (1st Dept. 1979); *cf. Martin Roofing, Inc. v. Goldstein,* 60 N.Y.2d 262, 265, 457 N.E.2d 700, 701, 469 N.Y.S.2d 595, 596 (1983), *cert. denied,*__U.S.__, 104 S.Ct. 1681, 80 L.Ed.2d 156 (1984). However, the Court has reviewed the documents upon which plaintiff relies and concludes that those memoranda are insufficient.

None of the documents prepared by defendant, with one possible exception, even mentions the word guarantee, and all of these documents taken together do not contain

the essential terms of the alleged oral contract of guarantee proved at trial. Thus, there is no mention of any agreement by plaintiff to forebear exercising its legal rights against Alla in exchange for Steag's guarantee, and certainly not the clear and unambiguous expression of an agreement to pay the debt of another, which the New York courts have required as a safeguard against oral testimony. *See, e.g., Savoy Record Co. v. Cardinal Export Corp.,* 15 N.Y.2d 1, 5-7, 203 N.E.2d 206, 208-09, 254 N.Y.S.2d 521, 525-26 (1964); *Salzman Sign Co. v. Beck,* 10 N.Y.2d 63, 67, 176 N.E.2d 74, 76, 217 N.Y.S.2d 55, 57-58 (1961); *Standard Oil, supra,* 260 N.Y. at 154, 183 N.E. at 279; *Walker v. Roth,* 90 A.D.2d 847, 847, 456 N.Y.S.2d 95, 95 (2d Dept.1982).

[1] The only document which even contains the word "guarantee" is a telex sent by Bonner, an Alla employee, to Hawley, which refers to defendant's *intention* to guarantee the debts of Alla. However, without reaching the issue of whether Alla was acting on Steag's behalf in sending this telex, which is not apparent from the telex itself, it is clear that a writing which at best evidences a future intention to guarantee is not sufficient to support an alleged existing oral guarantee.

[2,3] Steag did send a telex, jointly with H.C. Sleigh Ltd., a 50% owner of Alla, to Hawley and to all other Alla creditors which stated that they were working to strengthen Alla's "financial capacity" and that "[t]his strengthening is expected to result in a transfer of funds to your account in full payment of the indebtedness presently owed to you." It did not state that payment would be made by Steag, and it did not mention a guarantee.[2] Moreover, the fact that the joint telex was sent to all creditors of Alla detracts from the conclusion that it can or should be regarded as sufficient to evidence the alleged

specific oral contract of guarantee between Steag and plaintiff which plaintiff claims existed. The only other documents which arguably support the alleged oral guarantee were prepared by and signed only by plaintiff, and these are not sufficient. *See, e.g., Dorman, supra,* 66 A.D.2d at 415, 413 N.Y.S.2d at 380; *Brause v. Goldman,* 10 A.D.2d 328, 335, 199 N.Y.S.2d 606, 614 (1st Dept.1960), *aff'd,* 9 N.Y.2d 620, 172 N.E.2d 78, 210 N.Y.S.2d 225 (1961); *Chu v. Chu,* 9 A.D.2d 888, 889, 193 N.Y.S.2d 859, 860 (1st Dept.1959).

[4] In this respect, this case is markedly different from *Crabtree, supra,* which is heavily relied upon by plaintiff. In *Crabtree,* all of the essential terms and conditions of the oral contract were set forth in documents signed and/or prepared by the defendant. *See* 305 N.Y. at 57, 110 N.E.2d at 555. All that the *Crabtree* case holds is that where the entire contract is contained in such separate documents which all clearly refer to the same subject or transaction, and where the Court can ascertain the essential terms of the agreement by considering all of these various memoranda together and without recourse to oral testimony, the requirements of the statute of frauds can be satisfied. It does not hold, as plaintiff appears to argue, that the Court may take oral testimony to characterize or to establish a connection between the various memoranda at issue or to supply essential missing terms of the contract where the memoranda signed and/or prepared by the defendant are not otherwise sufficient. *See* 305 N.Y. at 55-56, 110 N.E. at 554.

[5, 6] Indeed, as New York case authorities make clear, and as the Appellate Division has most recently emphasized in *Cunnison v. Richardson Greenshields Securities, Inc.*, 107 A.D.2d 50, 54, 485 N.Y.S.2d 272, 276 (1st Dept. 1985), the purpose of the statute of frauds is to protect a defendant against having a contract established by oral testimony. *See also Martin Roofing, supra,* 60 N.Y.2d at 265, 457 N.E.2d at 701, 469 N.Y.S.2d at 596; *Ginsberg v. Fairfield-Noble Corp.*, 81 A.D.2d 318, 320, 440 N.Y.S.2d 222, 224 (1st Dept. 1981). Therefore, the memoranda relied upon to satisfy the statute of frauds must be such that from an examination of the documents themselves all of the essential terms and conditions of the oral contract may be obtained. *See, e.g., Intercontinental Planning, supra,* 24 N.Y.2d at 378-79, 248 N.E.2d at 579-80, 300 N.Y.S.2d at 822; *Crabtree, supra,* 305 N.Y. at 55-56, 110 N.E.2d at 554; *Standard Oil, supra,* 260 N.Y. at 155, 183 N.E. at 279; *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 314, 110 N.E. 619, 620 (1915); *Dorman, supra,* 66 A.D.2d at 416, 417-18, 413 N.Y.S.2d at 381; *Kobre v. Instrument Systems Corp.*, 54 A.D.2d 625, 626, 387 N.Y.S.2d 617, 618-19 (1st Dept. 1976), *aff'd,* 43 N.Y.2d 862, 374 N.E.2d 131, 403 N.Y.S.2d 220 (1978); *Chu, supra,* 9 A.D.2d at 888-89, 193 N.Y.S.2d at 860.

[7] In this case, the documents signed and/or prepared by the defendant manifest at best an agreement by the defendant to set up new letters of credit.[3] An examination of these documents alone, without recourse to oral testimony, does not permit the Court to ascertain all of the essential terms and conditions of the oral contract of guarantee which plaintiff established at trial.

[8] Plaintiff also argues that the defendant has admitted the existence of the oral contract and that therefore

under New York law, *see Holender v. Fred Cammann Productions, Inc.*, 78 A.D.2d 233, 434 N.Y.S.2d 226 (1st Dept. 1980), oral testimony is permissible to resolve disputes between the parties as to the terms of the alleged oral contract. Even assuming the correctness of the case relied upon by plaintiff,[4] the defendant in this case has not admitted the alleged oral agreement, but rather has consistently denied any oral contract of guarantee.

Plaintiff's argument that defendant has admitted the agreement alleged rests largely upon the contention that Steag agreed to open up unconditional letters of credit, which plaintiff claims amounted to an unequivocal guarantee of Alla's indebtedness to plaintiff. In this regard, plaintiff relies, *inter alia,* on the testimony of Dr. Thomas Mulert. Even assuming that Dr. Mulert's testimony can be construed to state that Steag opened up unconditional letters of credit, which is not clearly the case, *see, e.g.*, Trial Transcript ("Tr.") at 395-97, 468-80,[5] it is nonetheless insufficient to support the alleged oral guarantee.

An agreement to open new letters of credit, even unconditional letters of credit, is not the same as a contract of guarantee, even though the letters of credit, once established, permit plaintiff to secure payment without meeting any of the technical requirements normally set forth in conditional letters of credit. The terms, remedies, and the conduct which would constitute a breach of such a contract are all markedly different from those with respect to a contract of guarantee. It follows that a memorandum reflecting an agreement to open unconditional letters of credit is not sufficient to support an alleged contract of guarantee. *See, e.g., Stone v. Metropolitan Life Insurance Co.*, 12 N.Y.2d 487, 491, 191 N.E.2d 287, 288, 240 N.Y.S.2d 754, 755 (1963) (per curiam); *Standard Oil,*

supra, 260 N.Y. at 155, 183 N.E. at 279; *Poel, supra,* 216 N.Y. at 314, 310 N.E. at 620; *Dorman, supra,* 66 A.D.2d at 414, 413 N.Y.S.2d at 379; *Kobre, supra,* 54 A.D.2d at 626, 387 N.Y.S.2d at 619.

[9, 10] Plaintiff also contends that in continuing to ship coal to Alla and in not seeking to recover coal already shipped, plaintiff has already performed its end of the bargain and that the contract may therefore be enforced on a theory of partial performance. However, partial performance, under New York law, must be unequivocably referable to the alleged oral contract. Where, as here, plaintiff had a contractual obligation to deliver coal to Alla, the performance of that contractual obligation cannot properly be regarded as unequivocably referable to the alleged oral contract of guarantee. Therefore, it cannot constitute the part performance which the New York courts have recognized as sufficient to take an otherwise unenforceable oral contract outside of the statute of frauds. *See, e.g., American Bartenders School, Inc. v. 105 Madison Co.,* 59 N.Y.2d 716, 718, 450 N.E.2d 230, 230, 463 N.Y.S.2d 424, 424 (1983); *Anostario v. Vicinanzo,* 59 N.Y.2d 662, 664, 450 N.E.2d 215, 216, 463 N.Y.S.2d 409, 410 (1983); *Geraci v. Jenrette,* 41 N.Y.2d 660, 666-67, 363 N.E.2d 559, 564, 394 N.Y.S.2d 853, 857-58 (1977); *Burns v. McCormick,* 233 N.Y. 230, 232, 135 N.E. 273, 273 (1922); *Woolley v. Stewart,* 222 N.Y. 347, 351, 118 N.E. 847, 848 (1918); *Cunnison, supra,* 107 A.D.2d at 54, 485 N.Y.S.2d at 276-77; *Bakhshandeh v. American Cyanamid Co.,* 8 A.D.2d 35, 38, 185 N.Y.S.2d 635, 638 (1st Dept. 1959); *Bright Radio Laboratories, Inc. v. Coastal Commercial Corp.,* 4 A.D.2d 491, 494, 166 N.Y.S.2d 906, 909-10 (1st Dept. 1957).

The only remaining issue then is whether concepts of equitable and/or promissory estoppel render the oral con-

tract enforceable against the defendant. Plaintiff contends that had not the defendant orally guaranteed the performance of Alla's obligations, plaintiff would have ceased shipping coal to Alla and would have attempted to retrieve coal already shipped, and thus has suffered substantial prejudice in reliance upon Steag's promise.

[11] However, although the New York cases may not reflect a consistent pattern in distinguishing between equitable estoppel, promissory estoppel, and part performance, it is clear in New York that concepts of estoppel may require the enforcement of an oral promise only where a plaintiff has suffered an unconscionable injury. *See, e.g., Philo Smith & Co. v. USLIFE Corp.*, 554 F.2d 34, 36 (2d Cir. 1977); *American Bartenders School, supra,* 59 N.Y.2d at 718, 450 N.E.2d at 230, 463 N.Y.S.2d at 424; *Cunnison, supra,* 107 A.D.2d at 53, 485 N.Y.S.2d at 275-76; *Ginsberg, supra,* 81 A.D.2d at 320-21, 440 N.Y.S.2d at 224; *Swerdloff v. Mobil Oil Corp.*, 74 A.D.2d 258, 264, 427 N.Y.S.2d 266, 269-70 (2d Dept.), *leave to appeal denied,* 50 N.Y.2d 913, 409 N.E.2d 995, 431 N.Y.S.2d 523 (1980). Plaintiff has suffered no such unconsionable injury in this case.

[12] The only injury which plaintiff alleges is that which resulted from its performance of its contractual obligations to Alla. If that were sufficient, then in every case in which a seller has performed its contractual obligation, an oral contract of guarantee would be enforceable against the alleged guarantor. This result would not be consistent with the protection against oral testimony that the statute of frauds was designed to afford. *Cf. Martin Roofing, supra,* 60 N.Y.2d at 266, 457 N.E.2d at 702, 469 N.Y.S.2d at 597. Plaintiff has cited no authority which supports the claim that the performance of a contractual

obligation is sufficient to equitably estop a defendant from relying on the statute of frauds.

M.H. Metal Products Corp. v. April, 251 N.Y. 146, 167 N.E. 201 (1929), relied upon by plaintiff, is legally and factually inapposite. In that case, a defendant solicited an oral modification of a contract under which it had guaranteed payment, and orally agreed that the guarantee would continue under the modified contract. When plaintiff sued to enforce the guarantee, the defendant interposed the defense of the statute of frauds. The Court found it would be unconscionable and subversive of the broad policies of the statute to allow a defendant to assert the defense of the statute of frauds under those circumstances. *See id.,* 251 N.Y. at 150, 167 N.E. at 202. This case presents no such facts.

It follows from what has been said that defendant's motion for judgment notwithstanding the verdict must be granted and a judgment should be entered accordingly.

It is SO ORDERED.

FOOTNOTES

1. The statute provides, in relevant part:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, . . .if such agreement, promise or undertaking:

* * * * * * * *

2. Is a special promise to answer for the debt, default or miscarriage of another person.

2. This joint telex clearly does not evidence an unequivocal guarantee, but is equally consistent with defendant's argument that all it agreed to do was open letters of credit. In fact, defendant's position is further supported by an earlier telex sent to Hawley from Steag which states that "[t]he balance of the amounts owed to you by [Alla] shall be paid under letters of credit" to be opened by Steag.

3. The defendant testified that this was done to avoid the difficulties that had been encountered because of the inability of plaintiff to satisfy the technical requirements of the previously existing letters of credit.

4. The Court is not convinced that this precedent is truly reflective of the law in New York, and "Holender" does not, in the Court's view, appear to be consistent with the broad underlying purposes of the statute of frauds. *See, e.g., Martin Roofing, supra,* 60 N.Y.2d at 265, 457 N.E.2d at 701, 469 N.Y.S.2d at 596; *Cunnison, supra,* 107 A.D.2d at 54, 485 N.Y.S.2d at 276; *Ginsberg, supra,* 81 A.D.2d at 320, 440 N.Y.S.2d at 224.

5. Plaintiff also argues that Steag opened these unconditional letters of credit directly in favor of Hawley, and that this constitutes an agreement to unequivocally

guarantee payment of Alla to Hawley. Dr. Mulert consistently testified that Steag never opened any letter of credit directly in Hawley's favor, *see, e.g.*, Tr. at 434-38, 468, although he acknowledged that letters of credit opened for Alla could indirectly benefit Hawley because they could be transferred to Hawley. *See, e.g., id.* at 478; *cf. id.* at 415-17, 437-38, 462.

APPENDIX D—RELEVANT EXHIBITS BEFORE DISTRICT COURT

Exhibit Q-1: Telex dated October 15, 1981

WU INFOMASTER
HWLY NYK
0057671288 1105EST
NEW YORK, NEW YORK OCTOBER 15 1981
TLX 892413 ALLA WSH

ATT: MR. MAX BONNER

THE FOLLOWING INVOICES ARE OUTSTANDING: THE DATE SHOWN IS DATE SUBMITTED TO COMMERZBANK AND HAVE NOT BEEN PAID PENDING MINOR AMENDMENTS TO L/C WHICH HAVE BEEN REQUESTED AND APPROVED BUT NOT YET ISSUED.

DATE	L/C#	ALLA'S PO#	INV#	TONS	PRICE	AMOUNT	80% PYMT.DUE	AMT DUE
9/24	4536	502	0333	BALANCE DUE		20,579.08		20,579.08
10/9	4796	308	0343	6,386.25	25.00	159,656.25)		
				BTU PENALTY		-10,492.61)		149,163.64
10/8	4798	314	00517	3,350	36.50	122,275.00	97,820.00	97,820.00
10/6	4572	545	0346	1,524.75	26.00	39,643.50)		
				BTU PREMIUM		3,098.29)		42,741.79
10/6	4718	581	0345	2,366.15	26.00	61,519.90)		
				BTU PREMIUM		4,490.75)		66,010.65
10/6	4750	583	0344	1,565.40	26.00	40,700.40)		
				BTU PREMIUM		3,180.89)		43,881.29
10/9	4800	584	00518	2,730	42.50	116,365.00	93,092.00	93,092.00
9/16	4578	544	6276	BAL.DUE-PREMIUM		11,643.56		11,643.56

THE FOLLOWING INVOICES WERE SENT DIRECTLY TO ALLA-OHIO WHICH REPRESENTS A BALANCE DUE

8/6	0277	1,966.37	1,966.37
8/6	0278	700.48	700.48
8/6	0279	527.60	527.60

THE FOLLOWING INVOICES HAVE NOT BEEN SUBMITTED TO COMMERZBANK PENDING ISSUANCE OF L/C

10/6	337	00521	2,660	45.50	121,030.00	96,824.00)	
10/6	337	00524	2,570	45.50	116,935.00	93,548.00)	295,568.00
10/15	337	00528	2,890	45.50	131,495.00	105,196.00)	
TO BE BILLED	337		3,880	45.50	176,540.00		176,540.00
10/15	338	00531	728	45.00	32,400.00	25,920.00)	
	338	00532	2,570	45.00	115,650.00	92,520.00)	37,288.00
TO BE BILLED	338		5,502	45.00	247,590.00		247,590.00
10/6	339	00522	560	29.50	16,520.00	13,216.00)	
10/15	339	00530	1,020	29.50	30,090.00	24,072.00)	37,288.00

P.O. RECEIVED FROM ALLA-NO L/C RECEIVED-TO BE BILLED

			TONS APPROX			
		108	12,000	45.50	546,000.00	546,000.00
Shipped	50 cars	311	6,800	37.00	251,600.00	251,600.00
Shipped	22 cars	600	1,500	28.50	42,750.00	42,750.00
Nothing Shipped		618	1,000	37.00	37,000.00	37,000.00

BE
NOTE: CORRECTION—P.O. NO. 338 SHOWING A TOTAL OF 37,288.00
SHOUL BE 118,440.00

BEST REGARDS,
MARTIN FARBER
VICE PRESIDENT
HAWLEY FUEL CORPORATION
710 581 2247
HWLY NYK

ACCEPTED
(MSG NBR NOT IDENTIFIED)

Exhibit U-1: Telex dated October 15, 1981

HWLY NYK

WU INFOMASTER 1-019181D288 10/15/81
TLX WHITECASE WSH
NEW YORK, NEW YORK, OCTOBER 15, 1981
TWX 7105812247 HWLY NYK

OCTOBER 15, 1981

TO: HAWLEY FUEL, NEW YORK

ATTENTION: MR. RUFF

URGENT URGENT URGENT

THIS IS TO CONFIRM ON BEHALF OF STEAG HANDEL GMBH, THAT WE SHALL PAY TO YOU OUT OF OUR BANK ACCOUNT AT COMMERZ-BANK IN NEW YORK A DOWNPAYMENT FOR COAL SHIPPED BY YOU TO ALLA-OHIO IN THE AMOUNT OF US DOLLARS, 500,000. THE PAY-MENT SHALL BE EFFECTED BY TELEGRAPHIC TRANSFER ON OCTOBER 16, 1981.

THE BALANCE OF THE AMOUNTS OWED TO YOU BY AOV SHALL BE PAID UNDER LETTERS OF CREDIT OPENED AT COMMERZBANK NEW YORK. STEAG WILL OPEN THESE LETTERS OF CREDIT IN THE COURSE OF THE NEXT WEEK.

THOMAS MULERT
ON BEHALF OF STEAG HANDEL GMBH

WHITECASE WSH
1458 EST
HWLY NYK

Exhibit 11: Telex dated October 19, 1981

RCA GA
8418551971IM
248858 ALLA UR
OCT 19 1008 497013
8551971R STE D
TO: STEAG TELEX NO. 8371 OCTOBER 19, 1981
ATTN: DR. KLIEN, RAINER THESING, PLEASE

PAYMENTS MADE DIRECTLY FROM THE COMMERZBANK ACCOUNT

THE FOLLOWING ORDERS TO PAY WE WILL GIVE TO COMMERZBANK NEW YORK:

1. LAMBERT COAL CO. AMOUNT: US DOLLARS 37,380.35 WITH THIS AMOUNT MET COAL DELIVERIES FOR THE JAPANESE BUSINESS WILL BE PAID. LAMBERT COAL THREATENED TO STOP ANY FURTHER DELIVERIES IF THIS AMOUNT WOULD NOT HAVE BEEN PAID IMMEDIATELY.

2. AMBROSE BRANCH COAL INC. AMOUNT: US DOLLARS 485,848.80 WITH THIS AMOUNT COAL DELIVERIES WILL BE PAID. ALLA CLAIMS THAT THIS AMOUNT IS PAYABLE FOR COAL WHICH WAS NOT ONLY USED FOR THE JAPANESE BUSINESS BUT PARTLY ALSO FOR JOINT BUSINESS (CORAL). WE INSISTED UPON HAVING A PROMISSORY NOTE FOR THE FULL AMOUNT BUT PROMISED TO REDUCE SUCH NOTE ACCORDINGLY IF IT WOULD BE PROVEN TO US THAT PART OF THE COAL WENT TO THE CORAL. AMBROSE BRANCH, WHICH IS ALSO ONE OF THE BEST STEAM COAL SUPPLIERS, STOPPED

ALREADY DELIVERIES AND WAS ONLY WILLING TO TAKE THEM UP AGAIN WHEN THE PAYMENT WAS PROMISED.

WITH REGARD TO AMBROSE BRANCH AND LAMBERT COAL YOU SHOULD NOTE THAT ALLA HAD USED THEIR LAST CASH COMING OUT OF THE CREDIT LINE OF US DOLLARS 5 MIO AT EQUIBANK ON WEDNESDAY OCT. 14TH AND THURSDAY OCT. 15TH TO PAY SOUTHERN RAILROAD FOR RAILWAY FREIGHTS WHICH, IN AN AMOUNT STILL TO BE CHECKED, WAS ALSO POSSIBLY FOR THE JOINT BUSINESS.

3. NORTH CAROLINA STATE PORTS AUTHORITY
AMOUNT: US DOLLARS 83,333.33
THIS AMOUNT HAS TO BE PAID FOR RENT OF OCTOBER, IF AOV WOULD NOT PAY THERE WOULD BE NO EXTENSION OF THE LEASE.

THE AMOUNTS CONCERNING TO LAMBERT, AMBROSE AND N.C. STATE PORTS AUTHORITY BELONG TO THE PROMISSORY NOTE SIGNED OCT. 16, 1981 WITH AN AMOUNT OF US DOLLARS 606,562.48.

4. CHESAPEAKE AND OHIO RAILWAY AMOUNT: US DOLLARS 1,430,997.52 THIS AMOUNT HAS TO BE PAID FOR RAILROAD COSTS FO THE LAKE BERRYESSA, IT HAS BEEN IN THE CASH FORECAST OF OCTOBER 14TH.

5. HAWLEY FUEL COAL AMOUNT: US DOLLARS 500,000.00 THIS AMOUNT WILL BE PAID AS A DOWN-PAYMENT FOR DELIVERIES OF THE JOINT BUSINESS (MAINLY CORAL), COMMERZBANK

NEW YORK IS IN THE POSSESSION OF DOCUMENTS FOR MORE THAN US DOLLARS 500,000.00. WE AGREED WITH COMMERZBANK (MR. AST) THAT THIS DOWN PAYMENT WILL BE TAKEN INTO ACCOUNT WHEN MAKING THE PAYMENTS FOR THE ALREADY OPENED L/C'S.
HAWLEY HAD STOPPED FURTHER DELIVERIES BECAUSE THERE WERE 52 OPEN INVOICES WITH AN AMOUNT OF 1.6 MIO US DOLLARS.
THE AMOUNT OF US DOLLARS 500,000. HAS BEEN TAKEN INTO CONSIDERATION IN THE CASH FORECAST UNDER THE POSITION 'CASH OUT FROM L/C' WE WILL GIVE YOU THE SPECIAL AMOUNT FOR THE VESSELS AS SOON AS THE REQUESTED AMENDMENTS WILL ARRIVE FROM GERMANY TO COMMERZBANK NEW YORK.

THE AMOUNTS CONCERNING TO C AND O, AND HAWLEY DO NOT BELONG TO A PROMISSORY NOTE, IT IS A MATTER OF JOINT BUSINESS AND THE MONEY HAS BEEN OR WILL BE COLLECTED BY STEAG.

THE ABOVE MENTIONED PAYMENTS WILL BE MADE TODAY, WE WILL SEND YOU COPIES OF THE PROMISSORY NOTE, THE SLEIGH GUARANTEE AND THE AMENDMENTS OF THE PLEDGE AGREEMENT TODAY WITH MAIL.

PLEASE NOTE:

THE ABOVE PAYMENT DISTINCTION HAS TO BE MADE WITH REGARD TO THE US DOLLARS 3 MIO LOAN AGREED UPON BETWEEN SLEIGH AND STEAG ON FRIDAY OCTOBER 16TH AND COVERED BY THE SLEIGH GUARANTEE:

A) THE US DOLLARS 606,562.48 COUNT AGAINST THE LOAN.
B) THE BALANCE OF US DOLLARS 1,930,997.25 IS PAYMENT FOR THE JOINT BUSINESS IN THE ORDINARY CAUSE AND WOULD HAVE BEEN PAID UNDER L/C ACCORDING TO THE OLD PROCEDURE. THE PAYMENT FOR THE LAKE BERRYESSA (1,430,997.25) WILL BE MADE IN REPLACEMENT OF L/C NOT OPENED, FOR THE HAWLEY DOWN PAYMENT L/C'S ALREADY HAVE BEEN OPENED. THE PAYMENT (500,000.00) WILL COUNT AGAINST THESE OPENED L/C'S.

REGARDS,
DIETER ENGEL
STEAG/AOV

Exhibit V: Telex dated October 20, 1981

HWLY NYK

WU INFOMASTER 1-026765D293 10/20/81
TLX ALLA WSH
8363 WASHINGTON, D.C. 10.20.81
TWX 7105812247 HWLY NYK

TO HAWLEY FUEL TLX NO 8363 10.20.81
RE.: DELIVERY TO ALLA OHIO
WE HEREWITH WANT TO INFORM YOU THAT WE HAVE OPENED LETTER OF CREDITS IN YOUR FAVOUR IN THE AMOUNT OF USD 633,000.00 PROBABLY TOMORROW THE RELEASE WILL BE GIVEN TO THE BANK FOR EDITIONAL (sic) USD 1,385,000.00
BEST REGARDS
R. MOELLER
ATEAG (sic) HANDEL GMBH

1823 EST

HWLY NYK